

# **RISK MANAGEMENT APPENDIX**

## **Indemnification and Insurance Standards**

### **INSTRUCTIONS TO PROCUREMENT OFFICERS**

This appendix contains indemnification and insurance clauses for contracts for commodities and services. Instructions to procurement officers are shaded.

This document will be an appendix to the solicitation (i.e. Request for Quote, Informal Request for Proposal, Invitation for Bid, or Request for Proposal), and it will be incorporated into the purchase order or contract. **DELETE All Non-Applicable Clauses And Instructions Before Printing.**

Consider the potential risk associated with the contract being contemplated, and select the appropriate appendix.

- **Intermediate Indemnification with Additional Insured Endorsement** – requires the contractor to be responsible for its own liability and the joint liability of the contractor and the state. This is the most commonly used form of an indemnification clause. Use the intermediate indemnification clause, if there is the potential for the contractor's activities, over which the state would have no supervision or control, to create liability for the state. When an additional insured endorsement is required it may take up to 90 days until the insurance carrier provides it. Make sure that you verify receipt of the endorsement within 90 days.
- **Limited Indemnification with Certificate of Insurance** – should be used only in those instances where the contractor's activities will not create liability for the state. Obtain a certificate of insurance documenting required coverages are in place prior to executing the contract.
- **Inter-agency and routine political subdivision Indemnification (limited form) with Certificate of Insurance** – should be used in those instances when contracting with a North Dakota state agency or political subdivision (cities/counties). See the Risk Management Manual for contracts with political subdivisions addressing unique circumstances where no subcontractor is involved (inter-governmental form). Certificate of insurance should be obtained from political subdivision, but not necessary from a state agency.
- **Professional liability coverage** – is required when contracting with professionals for intellectual services such as physicians, dentists, attorneys, architects, engineers, accountants, insurance agents and brokers, appraisers, loss claims adjusters, tax consultants, risk investment brokers, and investment and divestiture consultants.

Consult your Assistant Attorney General or the Risk Management Division before making revisions to a clause. Contact the Office of Management and Budget, Risk Management Division at 701-328-7584 for assistance.

**DELETE These Instructions In The Final Draft Of The Appendix.**

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## Indemnification and Insurance Standards

RISK MANAGEMENT ANALYSIS MATRIX			
		Indemnification and Insurance	Indemnification and Insurance
Rating	Definition	Commodities	Services
High	Likely to cause severe injury/death, major property damage, significant disruption of business schedule, financial loss/increased cost, or degradation of performance.	Intermediate with Additional Insured Endorsement	Intermediate with Additional Insured Endorsement
MODERATE	Potential to cause injury/illness, property damage, some disruption of business schedule, financial loss/increased cost, or degradation of performance.	Limited with Certificate of Insurance	Intermediate with Additional Insured Endorsement
LOW	Presents a minimal threat to safety, health and well being of participants, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.	None  Or  Limited with Certificate of Insurance	Limited with Certificate of Insurance
LOW  Inter-agency And Routine Political Subdivision	Presents a minimal threat to safety, health and well being of participants, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.	None  Or  Limited with Certificate of Insurance	Limited with Certificate of Insurance
		* Certificate Not Required for ND Agencies	* Certificate Not Required for ND Agencies
		See the Risk Management Manual for contracts with political subdivisions addressing unique circumstances where no subcontractor is involved (inter-governmental form)	

## **RISK MANAGEMENT APPENDIX**

### **Indemnification and Insurance Standards**

#### **Intermediate Exposure with Additional Insured Endorsement – Goods and Services** *(Endorsement To Policy Is Necessary)*

**NOTE: CONSULT RISK MANAGEMENT OR YOUR ASSISTANT ATTORNEY GENERAL BEFORE MAKING REVISIONS TO THIS CLAUSE.**

**INTERMEDIATE INDEMNIFICATION REQUIRES THE CONTRACTOR TO BE RESPONSIBLE FOR ITS OWN LIABILITY AND THE JOINT LIABILITY OF THE CONTRACTOR AND THE STATE. THIS IS THE MOST COMMONLY USED FORM OF AN INDEMNIFICATION CLAUSE.**

**USE THE INTERMEDIATE INDEMNIFICATION CLAUSE IF THERE IS THE POTENTIAL FOR THE CONTRACTOR'S ACTIVITIES, OVER WHICH THE STATE WOULD HAVE NO SUPERVISION OR CONTROL, TO CREATE LIABILITY FOR THE STATE.**

#### Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from claims resulting from the performance of the contractor or its agent, including all costs, expenses and attorneys' fees, which may in any manner result from or arise out of this agreement. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

#### Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

**NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.**

**THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED OUTSIDE THE STATE OF NORTH DAKOTA.**

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## Indemnification and Insurance Standards

**DELETE (4) IF CONTRACTING WITH A  
RESIDENT (NORTH DAKOTA) VENDOR.**

***OPTION: DELETE IF NOT USED***

- 4) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

**NOTE: OPTIONAL CLAUSE (5) PROFESSIONAL  
ERRORS AND OMISSIONS.**

**THIS COVERAGE IS REQUIRED WHEN  
INTELLECTUAL ABILITY IS CONTRACTED FOR  
RATHER THAN STRICT PHYSICAL ACTIVITY.**

**IF THE PROFESSIONAL SERVICES INVOLVE A  
POLLUTION EXPOSURE, REQUEST POLLUTION  
LEGAL LIABILITY COVERAGE INCLUDING  
CONTRACTUAL LIABILITY AND COMPLETED  
OPERATIONS WITH MINIMUM LIMITS OF \$1,000,000  
EACH OCCURRENCE AND IN THE AGGREGATE.**

**DELETE (5) IF NOT NEEDED.**

***OPTION: DELETE IF NOT USED***

- 5) Professional errors and omissions, including a three year "tail coverage endorsement," with minimum liability limits of \$1,000,000 per occurrence and in the aggregate.

The insurance coverages listed above must meet the following additional requirements:

**NOTE: OPTIONAL SENTENCE IN 1)**

**"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-  
RETENTION IS SUBJECT TO APPROVAL BY THE  
STATE."**

**THIS SENTENCE IS NEEDED WHEN THERE IS A  
QUESTION ABOUT THE FINANCIAL WHEREWITHAL  
OF THE VENDOR TO SELF RETAIN THE EXPOSURE.  
THIS REQUIREMENT DOES NOT PERTAIN TO LARGE,  
FINANCIALLY VIABLE POTENTIAL VENDORS.**

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

***OPTIONAL SENTENCE: DELETE IF NOT USED***

The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better

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## Indemnification and Insurance Standards

by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.

- 3) The State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the Contractor in excess of the minimum requirements set forth above. The duty to indemnify the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The State of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
  - a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
  - b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
  - c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
  - d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the state and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
  - e) cross liability/severability of interest for all policies and endorsements;
- 6) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.

### NOTE: SENTENCE 7)

**WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.**

- 7) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 8) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

**\*\* For "Construction Contracts"** – *contracts for construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, railroad right of entry, sewer line, oil line, gas line, appurtenance, appliance or other improvement to real property, including any moving, demolition or excavation under such contract add the following insurance requirement:*

In addition to the above insurance requirements, Contractor may be required to purchase a project-specific insurance policy on behalf of State including but not limited to an Owner's Protective Liability insurance policy or a Project Management Protective Liability insurance policy with an occurrence limit of not less than \$1,000,000 and an aggregate of \$2,000,000. Said insurance shall be kept in force until the project is accepted by State.

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## Indemnification and Insurance Standards

### Limited Exposure with Certificate of Insurance – Goods and Services

*(Certificate Of Insurance Is Adequate Documentation)*

**NOTE: CONSULT RISK MANAGEMENT DIVISION OR LEGAL COUNSEL BEFORE MAKING REVISIONS TO THIS CLAUSE.**

**WHEN LIMITED EXPOSURE IS IDENTIFIED, EACH PARTY AGREES TO ASSUME LIABILITY AND EXPENSES (e.g. DEFENSE AND INVESTIGATION COST) FOR THEIR OWN ACTS. THIS IS ESSENTIALLY THE SAME AS THE LIABILITY THAT WOULD EXIST UNDER COMMON LAW, BUT IT IS SPECIFIED IN THE AGREEMENT.**

**LIMITED INDEMNIFICATION IS APPROPRIATE FOR CONTRACTS WITH VENDORS IN INSTANCES WHERE THE CONTRACTOR'S ACTIVITIES WOULD NOT CREATE LIABILITY FOR THE STATE.**

#### Indemnification

The State and Contractor each agrees to assume its own liability for any claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

#### Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

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The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The insurance required in this agreement, through a policy or endorsement, shall include:
- a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
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- c) the Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable;
- d) failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.